

1 misrepresented and failed to disclose certain terms of the Loan, including the annual
2 percentage rate and a prepayment penalty provision. *Id.* ¶¶ 32-34. Plaintiffs further allege
3 that they wish to sell the Residence due to a family member’s poor health but are unable to
4 do so in the current real estate market due in part to the Loan’s prepayment penalty and
5 negative amortization. *Id.* ¶¶ 36-40. The complaint asserts four claims: violations of the
6 Truth in Lending Act (“TILA”), 15 U.S.C. § 1601 *et seq.* (counts one and three), breach of
7 fiduciary duty (count two), and relief under HLC’s surety bond (count four). *Id.* ¶¶ 8-86.

8 On January 16, 2009, the Court issued an order granting in part and denying in part
9 Defendants’ motion to dismiss. Dkt. #22. The Court dismissed Mr. Mortensen’s TILA
10 claims and the claim for rescission under TILA (count one). *Id.* at 3-4. The Court denied
11 the motion with respect the breach of fiduciary duty claim (count two), Mrs. Mortensen’s
12 claim for damages under TILA (count three), and the bond claim (count four). *Id.* at 4-7.

13 Plaintiffs have filed a motion for leave to amend the complaint pursuant to Rule 15
14 of the Federal Rules of Civil Procedure. Dkt. #33. The motion has been fully briefed.
15 Dkt. ##37, 38. For reasons that follow, the Court will grant the motion in part and deny it
16 in part.¹

17 Rule 15 declares that courts should “freely give leave [to amend] when justice so
18 requires.” Fed. R. Civ. P. 15(a). The Supreme Court has instructed that “this mandate is to
19 be heeded.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). Rule 15’s “liberality in granting
20 leave to amend is not dependent on whether the amendment will add causes of action or
21 parties.” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987).

22 Plaintiffs seek to add as defendants Anthony Hsieh, a “designated officer” of HLC,
23 and Billy Bolden, a “responsible party” for HLC. Dkt. #33-2 ¶¶ 6-7. Plaintiffs allege that
24 Hsieh and Bolden breached fiduciary duties owed to Plaintiffs by, among other things,
25 allowing Gutierrez to induce Plaintiffs to forego the Duxford loan without fully

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27 ¹Defendants’ request for oral argument is denied because the issues have been fully
28 briefed and oral argument will not aid the Court’s decision. *See Lake at Las Vegas Investors
Group, Inc. v. Pac. Dev. Malibu Corp.*, 933 F.2d 724, 729 (9th Cir. 1991); *Partridge v.
Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

1 understanding Plaintiffs' financial situation. *Id.* ¶ 86. Defendants contend that the proposed
2 amendment is futile because corporate officers owe fiduciary duties solely to the corporation
3 (Dkt. #37 at 4), but the Court previously has determined that the complaint does not, as a
4 matter of law, fail to state a claim for breach of fiduciary duty. Dkt. #22 at 6; *see Standard*
5 *Chartered PLC v. Price Waterhouse*, 945 P.2d 317, 335 (Ariz. Ct. App. 1997) (the existence
6 of a fiduciary duty is generally a question of fact); *see also Dawson v. Withycombe*, 163 P.3d
7 1034, 1051 (Ariz. Ct. App. 2007) (corporate officers may be personally liable where they had
8 knowledge of the misrepresentation and acquiesced in it). Defendants further contend that
9 HLC's officers owed no fiduciary duties to Plaintiffs because HLC is a mortgage banker, not
10 a mortgage broker. Dkt. #37 at 4-5. This argument is better suited for a summary judgment
11 motion. *See* Dkt. #22 at 7 n.2. The Court will grant Plaintiffs leave to add Hsieh and Bolden
12 as defendants to the breach of fiduciary duty claim. Because this case is nearly a year old
13 already, and in light of the October 2, 2009 discovery deadline (Dkt. #30 ¶ 4), the Court will
14 require Plaintiffs to serve process on Hsieh and Bolden by August 28, 2009.

15 Plaintiffs also seek to add as defendants Countrywide Home Loan Servicing, L.P.,
16 BAC Home Loan Servicing, L.P., and Bank of America, National Association (collectively,
17 "BAC defendants"). Dkt. #33-2 ¶¶ 10-12. Plaintiffs assert that the BAC defendants will
18 need to consent to any modification of the Loan and therefore are proper parties under
19 Rule 19. Dkt. #34 at 4-5. Plaintiffs assert no claim against the BAC defendants, nor have
20 they shown that the BAC defendants are necessary parties. The Court will deny the motion
21 to amend with respect the BAC defendants.

22 Plaintiffs seek leave to add claims for misrepresentation and concealment of facts
23 (count one) and commingling of funds (count five) under A.R.S. § 6-947. Dkt. #33-2 ¶¶
24 74-83, 112-14. Defendants do not oppose those proposed amendments, but rather reserve
25 the right to address the new claims in motions brought under the Federal Rules of Civil
26 Procedure. Consistent with the liberal amendment policy of Rule 15(a), the Court will grant
27 the motion to amend with respect to the claims for misrepresentation and concealment of
28 facts and commingling of funds.

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- DATED this 17th day of August, 2009.

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